Migration Amendment (Offshore Resources Activity) Regulations 2018

Regulation Impact Statement

(OBPR ID: 23319)

Department of Home Affairs

March 2018

1. The Policy Problem

1.1 Background to the problem

The *Migration Amendment (Offshore Resources Activity) Act 2013* (the ORA Act) received Royal Assent on 29 June 2013 and came into effect on 30 June 2014. A Regulation Impact Statement (RIS) for this legislation was undertaken in March 2013. This RIS can be found at: http://ris.pmc.gov.au/2013/06/26/migration-amendment-offshore-work-and-other-measures-bill-regulation-impact .

The ORA Act supplements the existing provisions in section 5 of the *Migration Act 1958* by providing that a person will be taken to be in the migration zone while he or she is in an area to participate in, or support, an offshore resources activity in relation to that area. It also provides that a person who is in the migration zone to participate in, or support, an offshore resources activity must hold either a permanent visa, or a visa prescribed by the regulations for this purpose. The visas currently prescribed under the *Migration Regulations 1994* (the Migration Regulations) for this purpose are:

- the subclass 400 (Temporary Work (Short Stay Specialist)) visa;
- the subclass 482 (Temporary Skill Shortage) visa; and
- the subclass 457 (Temporary Work (Skilled)) visa.
    - The subclass 457 (Temporary Work (Skilled)) visa program was repealed on 18 March 2018 however the subclass 457 will remain as a prescribed visa to accommodate current visa holders.

1.2 Intention of the Legislation

The intention of the ORA Act was to regulate the employment of overseas workers in the offshore resources industry. It does this by expanding the scope of the migration zone and by extension the requirement to hold and comply with a valid visa, to all offshore resources activities, not just to persons working on a resource installation.

The ORA Act requires that all non-citizens who are on vessels or unmoored structures that are in an area to participate in or support an offshore resources activity hold a prescribed visa. This includes those working on support and cargo vessels servicing an Australian resources installation

1.3 Impact of the Legislation upon Offshore Resource Operators

The ORA Act has cost impacts across all phases of production including in the supporting maritime sector, as it requires crew to have either a permanent, a Subclass 400, 482 or 457 visa. For crews undertaking equivalent maritime work at mainland Australian ports they typically use the Maritime Crew visa (MCV).

Crew of vessels supporting offshore resource activities that are in the ORA area are required be on one of the prescribed visas as the MCV is not a prescribed visa. However, the prescribed visas do not reflect industry practice, and the nature of the labour market, especially for LNG operators. The subclass 457 and 482 visas are not an option as the positions of Ships Officer (ANZCSO 231214), Ship's Master (231213) and Ship's Engineer (231212) are not included on the skilled occupation lists. These are key occupations on any vessel and precluding these occupations from being used for vessels in the ORA area means they are not a viable visa option.

As a result of the change to the skilled occupation lists, and because the MCV is not currently prescribed as a visa allowing non-citizens to participate in, or support, offshore resources activities, crew members are typically restricted to applying for the subclass 400 visa. This visa is only available to people undertaking short-term, non-ongoing work. Subclass 400 visas are generally not granted more than once in a 12-month period.

The subclass 400 is designed primarily for limited entries to Australia and is not suited to the purpose of maritime crews undertaking numerous, intermittent and brief international entries solely to collect and transport petroleum products at sea.

The collection of product by contracted offtake carriers is arranged through the 'spot market' which has unpredictable patterns with short lead times. The application process and scope of the subclass 400 visa design does not reflect the work patterns of maritime crew or the activities involved in offtaking petroleum products. This in turn creates scheduling risks around the removal and transport of petroleum products resulting from an offshore resource activity, which can lead to the vessel being delayed by the uncertainty and delays in the visa application process. An offshore installation has limited storage capacity for product. According to industry, the risk that the offloading of product will be delayed may lead to the shut down or curtailment of the offshore resource activity potentially costing the company millions of dollars per day.

The majority of offtake carriers are foreign flagged vessels. As such, the crew on these vessels are foreign workers that carry out this work around the world and not just in Australian waters. There are only 11 Australian registered offtake carriers compared to over 9,000 worldwide. Due to the highly combustible nature of their cargo, offtake carrier crews are specially trained for this work to ensure that they can comply with safety regulations. The limited number of Australians trained to carry out this work means it is not feasible to employ more local crews.

These constraints and costs do not exist onshore as vessels interacting with mainland Australia use the MCV.

In addition to the uncertainty, costs associated with the prescribed visas (subclass 400, 482, or 457) can include:

- visa application charges;
- sponsorship and nomination fees;
- migration agent fees;
- financial contributions to training funds;
- costs linked to sponsorship obligations (such as record keeping and return travel costs);
- English language tests and medical examinations for visa applicants;
- paid health insurance for visa applicants; and
- costs associated with complying with immigration clearance and reporting requirements for maritime crews.

For these reasons, the ORA Act imposes costly, unnecessary and disproportionate regulation on the industry. A simpler, less expensive and more flexible approach would balance both the regulation of foreign workers and the legitimate requirements of the offshore resources industry.

2. Why is Government Action Needed?

Unnecessary and disproportionate regulation

The development of Australia's offshore resource activities contributes significantly to the Australian economy, and employs thousands of Australians. Australia is the world's ninth largest energy producer, and the oil and gas industry account for $2^1/_2$ per cent of GDP, generating $28 billion in revenue, and contributing $9 billion in direct tax payments. It is also critical for Australia's future energy security, accounting for 58 per cent of Australia's primary energy needs.

Employment growth in the maritime sector is projected to outpace growth in other industry sectors with employment levels for maritime crews increasing from 475 000 to 766 000 between 2013 and 2018. The sector is likely to experience an acute undersupply of appropriately skilled workers across all occupational groups with professionals and trade occupations being the worst affected.

The offshore resources industry has a strong international focus, and relies on a highly mobile workforce that can be transferred from project to project, and from country to country.

Migration arrangements therefore need to be relatively flexible, and not create excessive barriers for overseas labour, if skill shortages in the maritime industry are not to be exacerbated.

Since its introduction in 2013, industry groups have consistently opposed the ORA Act and have predicted there will be serious economic consequences. For example, Shipping Australia Limited has said that the ORA Act would 'have unintended consequences, be unwieldy to implement, substantially increase costs (in administration, ship time costs and wage bills for resource development projects) and be difficult to monitor to ensure compliance'. This would result in 'the suspension or cancellation of potential development projects' and 'negative impact on Australia's future export earnings and taxation revenue'. [1]

To comply with the existing visa requirements of the ORA Act, operators must ensure that all foreign workers in the offshore resources industry hold either a permanent visa, subclass 400, subclass 482, or subclass 457 visa.

Industry has expressed concern that the professions of Ships Officer (ANZCSO 231214), Ship's Master (231213) and Ship's Engineer (231212) were removed from the skilled occupation lists from 1 July 2017 meaning that a Subclass 482 or 457 visa cannot be used in most circumstances.

As a result of this change, most maritime crew members are restricted to applying for the subclass 400 visa. This visa is only available to people undertaking short-term, non-ongoing work and individuals are not generally granted more than one such visa in a twelve-month period.

Industry could apply for visas earlier but the subclass 400 visa application process does not reflect how the collecting and transporting of product is carried out on the 'spot market'. The unpredictable patterns and short lead times created by use of the 'spot market' means that the subclass 400 is not suitable for crew members on offtake carriers, who often need to travel to Australia on multiple occasions within a twelve-month period at short notice.

[1] Shipping Australia Limited submission to the 2013 Senate Committee Hearings on the Migration Amendment (Offshore Resources Activity) Act 2013 (the ORA Act).

Cost impacts would occur if an offshore resource platform shuts down production due to visa grant delays for the offtake carrier crew. Typically, an offtake carrier will be notified within 10 days that they need to come and pick up the product. If the product is not picked up in time, there is a risk that the offshore resource activity will need to be shut down until the product can be removed. Currently, a quarter of all subclass 400 visa grants take longer than 13 days to grant. The MCV offers a suitable alternative for this cohort, as it is a visa that allows a number of short trips over a three-year period.

Subclass 400 visas have been used as an interim solution to this problem and this has prevented a shut down occurring. However, this is not a sustainable long-term solution as the Subclass 400 visa can only be used for non-ongoing work and cannot be granted consecutively.

Industry has indicated that adding the MCV to regulation 2.06 AAC of the Migration Regulations in circumstances where the MCV would be for crews on an international voyage where product for export is taken directly from the offshore production and/or storage facility, would significantly relieve the administrative and financial burdens created by the ORA Act. Ensuring that crew on the offtake carriers are provided with the flexibility to come to a platform when required, without the risk of a delay because of visa applications would negate the dangers of production ceasing on offshore platforms. By restricting this change to the small number of crews on offtake carriers, the proposed approach would be consistent with the intent of the ORA legislation.

3. The Policy Options

3.1 Implement a visa with an obligations framework for the sponsoring employer

This option has previously been requested by union representatives and it would involve the development of regulations to create a temporary work visa specifically for non-citizens employed in the offshore resources industry. This would have a number of features common to the subclass 482 or 457 visa, such as a sponsorship framework, nomination of the position to be filled, labour market and/or salary criteria, and sponsorship obligations. The proposed change would affect all shipping and platforms in the ORA area.

3.2 Implement a limited regulatory amendment option

This option, which is the recommended approach, would involve the development of regulations that prescribe an existing visa option for non-citizens employed in the offshore resources industry. The preference would be to implement an option which has the least possible regulatory impact on the industry, but which gives effect to the requirements in the ORA Act. This will be possible through adding an existing visa product to the prescribed visas under the ORA Act.

This option would be given effect by amending the Migration Regulations to permit MCV visa holders to participate in, or support, an offshore resources activity where they are a member of the crew of a vessel undertaking an international voyage for export of product directly from an offshore production and/or storage facility. By restricting this change to the small number of crews on offtake carriers, the proposed approach would be consistent with the intent of the ORA legislation.

Potential delays caused by the longer period of time taken to grant either the subclass 400, 482, or 457 visas, which are longer than the MCV (the MCV can be auto granted) will be removed for this group. The MCV also has no visa application charge, unlike the subclass 400, 482, or 457 visas.

Therefore, this change will reduce the cost burden placed on industry by this requirement, and prevent delays, which may cause an offshore resource activity to shut down.

There would also need to be changes in the amendments to allow vessels to be immigration cleared without the arrival at a prescribed port. This cannot occur under current regulations for MCV holders, as they are not on a list of visas exempt from immigration clearance. If clearance were to be physically required, this would cause major delays to offtake carriers being able to export product from an offshore resource platform.

3.3. Continue with the 'status-quo' option

The Government could continue with the status quo and all foreign workers operating in the offshore resources industry would require either a permanent visa, a subclass 400, 482, or subclass 457 visa.

4. Analysis of the Options

4.1 A visa with an obligations framework for the sponsoring employer

Creating a temporary work visa specifically for foreign employees of the offshore resources activity may regulate the employment of non-citizens in the sector, as the ORA Act intended. However, this will also place an unnecessary administrative and financial burden on business and will lead to delays in visa grants. It would regulate the employment of overseas workers in the same way as the Subclass 457 and 482 visas without solving the underlying issues concerning offtake carriers. This may have a flow-on effect of not allowing product to be off-loaded onto ships with a resultant delay or shutting down of production.

The creation of a new visa with the similar administrative requirements to the subclass 400, 457 or 482 visas would not solve the issues for the offshore platforms. This option would also contradict current Government efforts to streamline work visas.

4.2 A 'limited regulatory amendment' option

A limited regulatory amendment option, involving use of the existing MCV product, reduces barriers to the recruitment of overseas labour in certain circumstances. This option offers the flexibility needed for the offshore resource industry to expand by facilitating easier access to overseas labour when it is required.

The proposed limited regulatory amendment option will remove both the administrative burden and uncertainty, and help ensure that this important sector of the national economy continues to flourish and expand.

This option does not impact on the entitlements of Australian workers as none are employed on these tankers. It only effects the visa which these workers enter the ORA area.

The Regulatory Burden and Cost Offset Estimate of $8 000 takes into account a small time saving made by all shipping agents applying for visas. The MCV has a shorter application process than either a Subclass 400, 457 or 482 visa. These subclass types need more detailed documentation to enable visa decision makers to be satisfied that the 'no adverse impact' regulation is met for offtake tanker applicants. This is not required for MCV applications. As the crews for offtake carriers are limited in numbers the Department of Home Affairs has calculated that there will be 360 visa applicants for the MCV for these purposes over a three year period.

Regulatory Burden and Cost Offset Estimate Table

Average Annual Compliance Costs (from Business as usual)				
Costs ($m)	**Business**	**Community Organisations**	**Individuals**	**Total Cost**
Total by Sector	-$0.008	$	$	-$0.008
Proposal is cost neutral?	**☐ yes**	**X no**		
Proposal is deregulatory	**X yes**	**☐ no**		
Balance of cost offsets	**$(0.008)**			

4.3 Continue with the 'status-quo' option

If the current visa regime were to continue, all foreign workers operating in the offshore resources industry will require either a permanent visa, a subclass 400, 482 or subclass 457 visa. Industry will continue to bear the direct costs involved with visa application charges. There will also be indirect costs associated with potential shut downs of offshore resource production caused by delays in the granting of visas. These would impose an undue impost and cost on industry.

It may also cause platforms to shut down production due to visa grant delays, which go beyond the 10 days needed by companies to ensure no stoppages in taking off product. Currently, a quarter of all subclass 400 visa grants take longer than 10 days to grant. This may affect the integrity and delivery of the option and significantly impact on industry. There is also a risk of serious, lasting damage to Australia's reputation as an attractive destination for investment.

5. Consultation

5.1 History of Consultations

On 27 February 2018, a letter was sent to 17 key stakeholders in the offshore resources industry and relevant unions, advising them of proposed amendments to the Migration Regulations to allow MCV holders to enter the migration zone to participate in, and support, offshore resources activity if they are undertaking an international voyage where product for export is taken directly from the offshore production and/or storage facility. A full list of recipients is contained in the table below.

LIST OF STAKEHOLDERS INVOLVED IN CONSULTATIONS FOR THIS ASSESSMENT	
NAME	**POSITION AND ORGANISATION**
Peter Metcalfe	General Manager Government Relations, Woodside Energy Ltd
Mark Robertson	General Manager, Jadestone Energy (Australia) Pty Ltd
Bill Townsend	General Manager, External Affairs and Joint Venture, INPEX Operations Australia Pty Ltd
John Williams	External Affairs Manager, INPEX Operations Australia Pty Ltd
Tom Baddeley	Manager Government Relations, Santos
Gavin Ryan	General Counsel, PTTEP Australasia (Ashmore Cartier) Pty Ltd
David Parker	Director Government and Public Affairs, Quadrant Energy Australia Limited
Chris Dunlop	General Manager, Northern Oil and Gas Australia Pty Ltd
Emmet Fay	Manager Government Relations, BHP Billiton Pty Ltd
Nilofar Morgan	Government Relations Manager, Shell Australia Pty Ltd
Scott Henderson	Chairman, Shipping Australia Limited
Paddy Crumlin	National Secretary, Maritime Union of Australia
Steve Knott	Chief Executive, AMMA Resource Industry Employer Group
Kieran Murphy	Director - External Affairs, Australian Petroleum Production and Exploration Association (APPEA)
Martin Byrne	Federal Treasurer, Australian Institute of Marine and Power Engineers (AIMPE)
Tim Higgs	President, Australian Maritime Officers Union
Noel Hart	Chairman, Maritime Industry Australia LTD

Recipients were invited to comment by 23 March 2018 on the likely impact of these changes to their respective organisations, including costs, savings and efficiencies.

5.2 Stakeholder views

Nine out of the 17 stakeholders who were sent correspondence have made submissions or consulted directly with the Department of Home Affairs. Formal responses have only been received by industry stakeholders. Responses have been positive about the suggested changes with a few suggestions on the limit and scope of the proposed changes.

These suggestions include:

1. the need for clearly defined parameters on the types of vessels, exactly what activities, and from what locations voyages can originate and terminate to be on an MCV; and
2. that voyages should allow for potential onshore visits to provide greater flexibility.

Direct consultation was undertaken from union representatives. In these discussions, it was indicated that while they are not opposed to the proposed amendment, they are cautious that the scope of changes does not have unintended consequences that allow other vessels to have their crews on the MCV.

This feedback has been taken into account during the drafting of the proposed legislation and the Department of Home Affairs is confident that the legislation is limited to the correct cohorts. The second suggestion is considered out of scope for this regulation change as the amendments are limited to international voyages that do not come to an onshore port.

6. What is the Best Option

6.1 Best Option

The limited regulatory amendment option is preferred as it offers a significant resolution through relatively minor changes to the Migration Regulations. Amending the Migration Regulations in the proposed manner will allow the use of an existing visa product, the MCV, which carries no application charge, can be auto-granted and allows multiple entry voyages over a period of three years.

This option will give industry certainty that once their application is approved, the holder of an MCV will have a valid visa for up to three year while tightly restricting the nature of the activity for which the MCV can be applied. This visa better reflects the requirements of the shipping industry by allowing multiple entry for the ship's crew. This will prevent delays to production and potential shut downs due to immigration issues.

7. Implementation and Evaluation

It is expected that the proposed amendments will be made in the second quarter of 2018. Implementation risks are low as this change is applied to a limited cohort. All risks revolve around appropriate information being communicated to stakeholders so that they understand the limit and scope of changes.

Following Parliamentary consideration of the *Migration Amendment (Offshore Resources Activity Activity) Regulations 2018*, the Department will update webpages and engage in direct consultation with stakeholders to inform them of the changes including dates of implementation.

The Department will closely monitor the impact of the changes in the short term, and if it has the right balance, the regulations will be formally reviewed before the instrument sunsets, in accordance with the provisions of the *Legislative Instruments Act 2003*.